Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

VERIZON'S OPPOSITION TO THE PETITIONS FOR RECONSIDERATION OF THE THIRD REPORT AND ORDER AND DECLARATORY RULING

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November 9, 2018

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VERIZON'S[1] OPPOSITION TO THE PETITIONS FOR RECONSIDERATION OF THE THIRD REPORT AND ORDER AND DECLARATORY RULING

The Commission's *Third Report and Order and Declaratory Ruling*[2] took key steps to reduce barriers to wireless and wireline infrastructure investment. The *Third Report and Order* (hereinafter the "*Poles Order*") fundamentally reformed the Commission's pole attachment framework while the *Declaratory Ruling* held that blanket state and local moratoria on communications facilities deployment are barred by the Communications Act. As explained in more detail below, the Commission should deny the various petitions to reconsider the *Poles Order* and the *Declaratory Ruling* because the Commission's reforms are supported by substantial evidence and none of the petitioners has shown that reconsideration is warranted. Retaining these key reforms is vital to promoting broadband and 5G deployment and helping the U.S. retain its leadership position in the global internet economy.

[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 & WT Docket No. 17-79; FCC 18-111 (Aug. 3, 2018).

I. THE COMMISSION SHOULD DENY THE PETITION TO RECONSIDER THE *POLES ORDER*.

The *Poles Order* continued the Commission's important efforts to promote broadband deployment by making the pole attachment process faster and more efficient, including by adopting a new one-touch make-ready ("OTMR") pole attachment process. The *Poles Order* also took important steps to address outdated pole attachment rate disparities, to codify the Commission's overlashing precedent, and to confirm that new attachers are not responsible for preexisting violations. These important changes will help speed deployment of broadband by enabling attachers to upgrade existing facilities and build out new facilities in communities more quickly and efficiently. While the Coalition of Concerned Utilities ("the Coalition") seeks to reverse or undermine parts of the *Poles Order*, its request merely regurgitates arguments in the underlying proceeding and should be denied.[3]

A. The Commission Should Reject Efforts to Undermine its Work to Address Outdated Rate Disparities.

To continue addressing legacy rate disparities, the *Poles Order* establishes a presumption that for "new and newly-renewed" pole attachment agreements, an incumbent LEC should be charged no higher than the current telecom rate.[4] Electric utilities can rebut the presumption by demonstrating with "clear and convincing evidence" that the incumbent LEC receives net

[3] *See* Coalition of Concerned Utilities Petition for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Oct. 15, 2018) ("Coalition Petition"). By failing to show that there is either a material error or omission, and by failing to raise additional facts not previously known or considered, the Coalition's petition cannot succeed. *See* 47 C.F.R. § 1.106(c); *Griffin Licensing*, Memorandum Opinion and Order, 29 FCC Rcd 9680, ¶ 4 (2014).

[4] *Poles Order* ¶ 123. The Order defines a "new or newly-renewed agreement" as "one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status." *Poles Order* ¶ 127 n.475.

benefits that materially advantage the incumbent LEC over other telecommunications attachers.[5] If the presumption is rebutted, the pre-*2011 Pole Attachment Order*[6] telecom rate "is the maximum rate that the utility and incumbent LEC may negotiate."[7] For agreements that do not qualify as "new or newly-renewed" pole attachment agreements, the *2011 Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply.[8] While the Commission should continue to work to help resolve ongoing disparities in the future, the Commission should deny the Coalition's requests to undo these reforms.

The Coalition continues to argue – as it did in the underlying proceeding – that historical joint use agreements somehow give incumbent LECs unique benefits and therefore the Commission should eliminate both the telecom rate presumption and the pre-*2011 Pole Attachment Order* telecom rate cap that applies if the presumption is rebutted.[9] But as we clearly set forth during the proceeding, while electric utilities assert that the incumbent LEC is advantaged over its competitors, they have not provided evidentiary support for the claim. Based on the evidence in the record,[10] the Commission properly rejected the electric utilities' assertions.

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[5] *Id*. ¶ 123; *id*. at Appx. A, revised § 1.1413(b).
[6] *Implementation of Section 224 of the Act*, *et al*., Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) ("*2011 Pole Attachment Order*").
[7] *Poles Order* ¶ 129.
[8] *Id*. ¶ 127 n.478.
[9] *See* Coalition Petition at 4-6.
[10] *See*, *e.g.*, Verizon Ex Parte, WC Docket No. 17-84, at 4-5 (July 26, 2018) ("Verizon July 26 Ex Parte"), *citing Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric Power Co. d/b/a/ Dominion Virginia Power*, Order, 32 FCC Rcd 3750, ¶¶ 18, 20, 22 (2017) ("*Verizon v. Dominion Virginia Power*") (holding that Verizon pays unjust and unreasonable pole attachment rates and finding that the record suggests that "Dominion has overstated the value of a number of such alleged benefits" and "with only a few exceptions, Dominion does not quantify the purported material advantages that Verizon receives"); *see also* Verizon Pole Attachment Complaint, *Verizon v. Dominion Virginia Power*, No. 15-190, at 20-41 (Aug. 3, 2015) (arguing

The Coalition's Petition also ignores the Commission's prior instruction that the comparative analysis must "weigh, and account for, the different rights *and responsibilities*" imposed on incumbent LECs under joint use agreements.[11] The *2011 Pole Attachment Order* thus correctly required that the incumbent LEC enjoy a "net" material advantage over its competitors to justify a higher rate,[12] and the *Poles Order* properly preserves that requirement. Considering the substantial evidence supporting the Commission's adoption of the incumbent LEC telecom rate presumption and the pre-*2011 Pole Attachment Order* telecom rate cap, there is no basis for the Commission to reconsider these issues.[13]

The Commission should reject the Coalition's fallback assertion that the incumbent LEC telecom rate presumption should not apply to "newly-renewed" agreements.[14] The Coalition attacks the *Poles Order*'s finding that "incumbent LEC bargaining power vis-à-vis utilities has continued to decline"[15] by claiming that incumbent LECS are large companies and that incumbent LECs are somehow intentionally reducing the number of poles they own.[16] But the Commission's finding that incumbent LECs lack bargaining power is supported by substantial

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that the parties' joint use agreement did not provide unique benefits that justify charging Verizon a rate higher than the telecom rate); USTelecom Ex Parte, WC Docket No. 17-84, at 4-7 (June 6, 2018) (explaining that higher incumbent LEC rates are not justified by purported benefits of joint use); AT&T NPRM Reply Comments, WC Docket No. 17-84, at 12 (July 17, 2017) ("[T]he disparity in the pole attachment rates some IOUs charge for ILEC attachments relative to cable and CLEC attachments is huge and is not remotely justified by any other provision of existing joint use agreements.").

[11] *2011 Pole Attachment Order* ¶ 216 n.654 (emphasis added).

[12] *Id*. ¶ 218.

[13] Regardless, the *Poles Order* still allows an electric utility to try to rebut the incumbent LEC telecom rate presumption with clear and convincing evidence that incumbent LECs receive net material benefits. *See Poles Order* ¶¶ 123, 128.

[14] *See* Coalition Petition at 5 n.15.

[15] *Poles Order* ¶ 126.

[16] *See* Coalition Petition at 5 n.15.

evidence that significant pole ownership disparities have often existed from the start of joint use relationships and have increased over time, and that an incumbent LEC would not be guaranteed a new and timely agreement allowing efficient further deployment if it tried to terminate a joint use agreement or its evergreen provision that the electric utility refuses to renegotiate.[17]

Finally, the Commission should dismiss the Coalition's request to revise the *Poles Order* to condition any rate relief for an incumbent LEC on making commensurate per-pole reductions in the rate that the electric utility pays to attach to the incumbent LEC's poles.[18] First, as the Coalition recognizes,[19] the Commission has already noted that the incumbent LEC should charge the electric utility a proportionate rate.[20] Mandating a further change is not supported by the record since – as the Commission has found – electric utilities have in some instances used their

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[17] *See Poles Order* ¶¶ 124-25 (discussing decline in incumbent LEC pole ownership); *see also* Verizon July 26 Ex Parte at 2-3 (citing examples of persistent pole ownership disparities and explaining that "[p]ower companies have . . . tried to force incumbent LECs into an impossible choice between paying unreasonable rates or removing existing attachments"); AT&T NPRM Comments, WC Docket No. 17-84, at 23 (June 15, 2017) ("AT&T's bargaining power with electric utilities has significantly eroded over time, as its percentage of pole ownership relative to electric utility poles has dropped. . . . This reduced leverage has resulted in higher attachment rates paid by AT&T's ILECs to electric utilities relative to competitors that benefit from the telecommunications rate."); Frontier NPRM Comments, WC Docket No. 17-84, at 6 (June 15, 2017) ("Currently, in FCC regulated states, Frontier owns only about 15% of the joint poles compared to investor-owned electric companies, evidencing Frontier's lack of bargaining power to negotiate more reasonable rates that reflect today's market realties. ILECs now compete head-to-head with cable, telecommunications, and broadband companies for the same customers, but lack the ability to negotiate competitive pole attachment rates."); USTelecom Ex Parte, WC Docket No. 17-84, at 2-3 (Mar. 26, 2018) ("[G]iven the disparity in pole ownership between ILECs and IOUs, ILECs often face a 'Hobson's choice' in their negotiations with IOUs: 'live with insupportably high attachment rates that distort competition, or risk major disruption of their networks to obtain even the chance of a reasonable renegotiation.' As USTelecom has demonstrated in this proceeding, the imbalance in pole ownership and the resulting lack of ILEC bargaining power that was integral to the Commission's decision to institute rate reforms in 2011 continues to this day.").

[18] *See* Coalition Petition at 7.

[19] *See id*. at 7 n.18.

[20] *See 2011 Pole Attachment Order* ¶ 218 n.662.

bargaining power to not just increase the rates they charge incumbent LECs, but also to reduce the rates they pay incumbent LECs.[21] In such circumstances, any commensurate rate reduction for the electric utility would perpetuate rather than reduce rate disparities. Moreover, because the relative rates charged to the utility and the incumbent LEC will continue to factor into the Commission's analysis of an incumbent LEC's pole attachment rate complaint,[22] there is no need to further address electric utilities' rates more broadly.

B. The Commission Should Deny the Coalition's Request to Modify the New Pole Attachment Timelines.

The Coalition seeks to extend pole attachment timelines for both OTMR and non-OTMR applications, including increasing:

- the period to review applications for completeness from ten business days "to 15 business days with additional time added for any *force majeure* and other events beyond the pole owner's control;"[23]
- the notice period for contractor surveys from three business days to ten business days;[24]
- the period to decide an OTMR application from 15 days to 30 days;[25] and
- the advance notice period for OTMR work from 15 days to 30 days.[26]

The Coalition's only justification for most of these increases is that they "will promote a more efficient and reliable process."[27] The Coalition also asserts that extra time is needed to review

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[21] *See*, *e.g.*, Verizon NPRM Comments, WC Docket No. 17-84, at 13 (June 15, 2017) ("Verizon NPRM Comments") *citing Verizon v. Dominion Virginia Power* ¶ 21 (finding that the record supports Verizon's argument "that the per-pole rate that Dominion charges Verizon . . . far exceeds the per-pole rates that Verizon charges Dominion despite the fact that Dominion uses significantly more space on each joint use pole than Verizon").
[22] *See* Verizon NPRM Comments at 13-14; *2011 Pole Attachment Order* ¶ 219.
[23] Coalition Petition at 24.
[24] *Id*. at 10, 24.
[25] *Id*. at 24.
[26] *Id*.
[27] *Id*.

applications for completeness because "utilities can have chaotic schedules" that result from events outside of their control.[28]

None of these reasons provides a basis for reconsideration. The *Poles Order* revised the pole attachment rules "to facilitate faster, more efficient broadband deployment."[29] If accepted, the Coalition's proposals would substantially lengthen those timelines. In particular, the Coalition's proposals would lengthen the OTMR timeframe by at least 22 days and probably longer.[30] The Coalition's mere preference for a longer timeframe does not warrant reconsideration of the Commission's pole attachment timelines, particularly in light of the substantial evidence supporting the Commission's pursuit of more streamlined processes.

The Commission should also retain the *Poles Order*'s requirement that the pole owner make commercially reasonable efforts to provide three business days' notice of surveys in the non-OTMR process.[31] The Commission explained that this notice can "increase collaboration" and help the parties "identif[y] potential issues to ensure safety and network reliability."[32] The Coalition argues this advance notice should be made optional because "many new attachers do not want joint ride-outs."[33] But attachers who desire to participate in joint ride-outs will be unable to do so if the provision is made optional or shortened to 24 hours as the Coalition requests.

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[28] *Id*.
[29] *Poles Order* ¶ 13.
[30] The Coalition's additional 15 days to decide an OTMR application plus the Coalition's additional five business days to review an application for completeness amounts to approximately 22 days, assuming five business days equals seven calendar days. This 22 days does not include any delays resulting from the Coalition's proposals to increase the notice period for contractor surveys by seven business days and the notice period for OTMR work by 15 days.
[31] *Poles Order* ¶ 82; Coalition Petition at 10.
[32] *Poles Order* ¶ 82 n.299.
[33] Coalition Petition at 19.

C. There Is No Basis for Reconsidering the Commission's Codification of Its Overlashing Precedent.

The Commission should retain the *Poles Order*'s codification of the Commission's "longstanding policy that utilities may not require an attacher to obtain its approval for overlashing."[34] The Coalition seeks to undo the Commission's ruling – and impose prior-approval requirements and a host of restrictions that would cripple the benefits of overlashing – because the Coalition disputes the Commission's finding that its overlashing policy has not caused "significant safety or reliability issues."[35] The Coalition completely ignores, however, the Commission's finding and supporting evidence that "an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion."[36] Thus, the *Poles Order* reasonably considered and addressed the safety and reliability concerns that the Coalition now seeks to re-litigate.[37] There is no reason for the Commission to revisit its holding that pole owners cannot require advance approval for overlashing.

The Commission should also reject the Coalition's cursory alternative positions that the *Poles Order* should be reconsidered to allow pole owners to require engineering studies as part of advance notice; require that materials to be overlashed be identified as part of advance notice; and require reimbursement of costs incurred to review, engineer, or inspect the overlashing.[38] The *Poles Order* considered and rejected such requirements as unnecessary or likely to "unduly

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[34] *Poles Order* ¶ 115.
[35] *Id.* ¶ 117.
[36] *Id.*
[37] *See Poles Order* ¶¶ 116-19 (addressing commenters' concerns).
[38] *See* Coalition Petition at 12.

slow deployment with little offsetting benefit."[39] The Coalition does not show any material error or failure to consider the evidence that would justify reconsideration.

The Coalition also fails to show material error in the Commission's holding that "[a] utility may not deny access to overlash due to a pre-existing violation on the pole."[40] The Coalition asserts that this holding is unreasonable[41] but ignores the Commission's explanation that "a party that chooses to overlash on a pole with a safety violation and causes damage to the pole or other equipment will be held responsible for any necessary repairs."[42] There is no basis for the Commission to reconsider this issue. Finally, in light of undisputed record evidence that it often makes economic sense for attachers to retire facilities in place,[43] there is no need to reconsider the *Poles Order* to address the Coalition's repeated argument that attachers should remove unused facilities prior to overlashing them.[44]

D. There is No Reason for the Commission to Reconsider Its Framework for Self-Help in the Electric Space.

Contrary to the Coalition's arguments,[45] there is no basis for reconsidering the *Poles Order*'s framework for self-help in the electric space because the Commission set appropriate guidelines, including a 90-day period for the electric utility to complete work before the "self-help" remedy is triggered, and safeguards that specifically address utilities' concerns about safety and equipment integrity.[46] The *Poles Order* also finds – and the Coalition cannot show otherwise – that the attacher's advance self-help notice and post-completion notice, and utilities'

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[39] *See Poles Order* ¶ 119 n.444.
[40] *Id*. ¶ 116 n.429.
[41] *See* Coalition Petition at 12-13.
[42] *Poles Order* ¶ 116 n.429.
[43] *See* Verizon FNPRM Reply Comments, WC Docket No. 17-84, at 19-20 (Feb. 16, 2018).
[44] *See* Coalition Petition at 13.
[45] *See id*. at 7-10.
[46] *See Poles Order* ¶ 99

ability to require that contractors adhere to their protocols for working in the electrical space, will allow the utility to address any safety and equipment issues.[47] Moreover, the record shows that contractors today regularly and safely work on broadband and power attachments.[48]

The Commission should also reject the Coalition's requests to impose additional restrictions on contractor selection for self-help in the electric space. As noted above, attachers will be required to use a contractor that is pre-approved by the utility and will "adhere to utility protocols for working in the electric space."[49] Therefore, there is no reason for the Commission to impose a separate requirement that "a licensed Professional Engineer should be required to sign off on the survey data" regarding make-ready work in the electric space.[50] The Commission should also deny the Coalition's request that electric utilities have the unfettered right "to veto any contractor for any reason performing electric space work on any electric utility or ILEC-owned poles."[51] There is no support for such an expansive veto power that could effectively nullify the self-help remedy.

Finally, the Commission should deny the Coalition's request that "utilities should be entitled to recover their costs associated with such self-help surveys" for make-ready in the electric space.[52] As the Commission has explained, "the new attacher should not be penalized when existing attachers and the utility miss their deadlines by holding a new attacher responsible

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[47] *See id*.
[48] *See* Power and Communication Contractors Association Ex Parte, WC Docket No. 17-84, at 2 (Dec. 1, 2017).
[49] *Poles Order* ¶ 99.
[50] Coalition Petition at 10.
[51] *Id*. at 21.
[52] *Id*. at 26.

for both the costs of doing the work itself and reimbursing the expenses of the utility and existing attachers to monitor and inspect that work."[53]

E. There is No Basis for Modifying the Contractor Selection Process.

The Commission should deny the Coalition's more general requests to modify the contractor selection process. The Coalition argues that electric utility pole owners should not be required to maintain a list of approved contractors to perform complex self-help make-ready work and self-help work above the communications space.[54] But the Coalition cannot have it both ways: it cannot both complain about an alleged safety risk from using attacher-selected contractors and yet refuse to alleviate the alleged risk by keeping a list of approved contractors.[55]

The Commission should also reject the Coalition's proposals that a "Professional Engineer stamp should accompany all survey and construction work performed by a contractor hired by a communications company."[56] The *Poles Order* requires that contractors comply with five minimum safety and reliability standards, including that the contractor "meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility."[57] Thus, there is no need for the Commission to impose additional, across-the-board requirements because the contractor-selection framework provides utilities with the flexibility to impose additional requirements so long as they are reasonable.

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[53] *Poles Order* ¶ 102 n.362.
[54] *See* Coalition Petition at 21.
[55] The Commission has explained that complex self-help and self-help above the communications space "can involve greater risks than simple make-ready and we agree with numerous commenters that utility selection of eligible contractors promotes safe and reliable work in more challenging circumstances." *Poles Order* ¶ 106.
[56] Coalition Petition at 22-23.
[57] *Poles Order* ¶ 39. The *Poles Order* sets forth five minimum requirements for safety and reliability that contractors on a utility-approved list must satisfy, *see id*., and states "Where there is no utility approved list . . ., [t]he new attacher must certify to the utility . . . that the named contractor meets the same five minimum requirements for safety and reliability," *id*. ¶ 40.

The Commission should also deny the Coalition's vague proposal that "utilities should be entitled to require a 'ramp-up' period to evaluate any new contractor."[58] The Coalition does not specify the length of this ramp-up period nor the contours of the evaluation that would occur during that period. This proposal is far too vague for the Commission to adopt.

Finally, the Commission should reject the Coalition's request that "any attacher hiring non-union personnel should reimburse the pole owner for union contract costs incurred by the utility pole owner because union workers were not used."[59] The *Poles Order* declined to make any exceptions for existing attachers subject to collective bargaining agreements, explaining that "[n]ew attachers that are not parties to a CBA, have no obligations under such a CBA" and "[i]t is the new attacher's contractor that will be performing the make-ready work, so the CBA is not implicated."[60] The *Poles Order* also found that tailoring the Commission's pole attachment rules "to an existing attacher's CBA 'would . . . be administratively unmanageable for new attachers.'"[61] The Coalition's Petition does not show any error in this reasoning.

F. There Is No Need to Reconsider the *Poles Order*'s Rulings Regarding Preexisting Violations.

The *Poles Order* holds that costs or delays associated with remedying preexisting violations cannot be imposed on new attachers.[62] The Coalition disagrees but does not show any error by the Commission. The Coalition takes issue with the *Poles Order*'s clarification that "utilities may not deny new attachers access to the pole solely based on safety concerns arising

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[58] Coalition Petition at 22.
[59] *Id*.
[60] *Poles Order* ¶ 47.
[61] *Id*. ¶ 48, *quoting* Verizon NPRM Reply Comments, WC Docket No. 17-84, at 8 (July 17, 2017). *See also* Google Fiber Ex Parte, WC Docket No. 17-84, at 2 (June 4, 2018).
[62] *See Poles Order* ¶¶ 121-22.

from a pre-existing violation,"[63] asserting this would mean that red-tagged poles must "be replaced immediately" as an impermissible mandate to expand capacity.[64] The rulings at issue, however, do not require the replacement of a red-tagged pole to expand capacity. Instead, the Commission's ruling merely requires that the utility provide *access* to an existing pole that has been red-tagged because of a pre-existing safety violation. As the Commission explained, "denying new attachers access [in such situations] prevents broadband deployment and does nothing to correct the safety issue."[65]

The Commission should also reject the Coalition's request to make a new attacher responsible for the costs of correcting a preexisting violation caused by another party. The Coalition purports to recognize that revised Section "1.1411(d)(4) prevents the new attacher from being charged by the utility for the costs to replace a pole with a pre-existing violation," but the Coalition proceeds to argue that the new attacher must pay those same costs under Section 1.1408(b), which provides that the costs of modifying a facility shall be borne by parties that obtain access to facility as a result of the modification, parties that directly benefit from the modification, and subsequent attachers if the modification made the subsequent attachments possible.[66] The Commission should reject this argument because the Coalition has not shown

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[63] *Id*. ¶ 122.
[64] *See* Coalition Petition at 14.
[65] *Poles Order* ¶ 122.
[66] Coalition Petition at 16; *see Poles Order* at App'x A, Revised 47 C.F.R. § 1.1411(d)(4) ("A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards and guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment."); 47 C.F.R. § 1.1408(b) ("The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall

any material error in the *Poles Order* or conflict between the two regulations that would warrant reconsideration.

The Coalition's remaining proposals regarding preexisting violations are similarly meritless. The Coalition asks that "unauthorized attachers be responsible for the costs associated with make-ready, including the correction of violations."[67] The Coalition also proposes that if the pole owner cannot determine who caused a preexisting violation, "the costs should be shared by any communications company entity which reasonably might have caused the violation."[68] But it makes no sense to require any party – even an unauthorized attacher – to pay for other parties' preexisting violations. Instead, responsible parties should pay to remedy any violations they cause.

G. The Commission Should Reject the Coalition's Request for Reconsideration on Other Issues.

The Commission should reject the Coalition's efforts to impose new responsibilities or costs on new attachers as part of the non-OTMR process. The Coalition argues that new attachers should be required to identify the existing attachers and collect make-ready estimates from them because new attachers are "better positioned and motivated" to undertake these

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be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.").

[67] Coalition Petition at 16-17.

[68] *Id*. at 17.

activities.[69] But the pole owner – not the new attacher – has records of the attachers on its poles and therefore it's nonsensical for the Coalition to suggest that the new attacher should be tasked with identifying the existing attachers or obtaining estimates from them. The Commission should also reject the Coalition's alternative requests that the Commission clarify that pole owners "will not be penalized" if attachers fail to supply a timely make-ready estimate and that pole owners can impose penalties on existing attachers who provide tardy estimates.[70] Matters relating to timely make-ready estimates and penalties for failure to comply are best addressed in pole owners' agreements with attachers. To the extent that such issues are relevant to a pole attachment complaint, the Commission can consider those issues on a case-by-case basis.

The Commission should also reject the Coalition's request that any attacher who requests pole-by-pole make-ready estimates or invoices should be required to pay the pole owner's "additional accounting system and personnel cost necessary to generate these breakdowns."[71] Adopting the Coalition's proposal would effectively nullify the Commission's ruling regarding detailed make-ready estimates because no attacher would request such detailed estimates if it meant paying for the pole owner to upgrade its accounting system. Similarly, the Commission should deny the Coalition's request to "specify that utilities will not be penalized for the additional time required to prepare those [detailed] estimates."[72] No new attacher will ever request a detailed estimate if doing so replaces the 14-day deadline for providing a make-ready estimate[73] with no deadline at all.

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[69] *See id*. at 17-18 (arguing new attachers should gather make-ready estimates, not pole owners); *id*. at 19 (arguing the Commission should require new attachers to identify existing attachers).
[70] *See id*. at 18.
[71] *Id*.
[72] *Id*.
[73] *See* 47 C.F.R. § 1.411(d).

Further, the Coalition fails to show that the *Poles Order*'s silence on the Coalition's "double wood" proposal was somehow a material omission that justifies reconsideration.[74] If the Commission decides to take up the issue, it can do so in a future order rather than through reconsideration of the *Poles Order*. Indeed, the Commission in this proceeding has issued a series of orders on various infrastructure issues rather than addressing every issue in one order.

II. THE COMMISSION SHOULD AFFIRM ITS RULING THAT EXPRESS AND *DE FACTO* MORATORIA VIOLATE SECTION 253 OF THE ACT.

The Commission's ruling that moratoria on the deployment of telecommunications services or facilities violate Section 253(a) of the Communications was legally correct and supported by ample evidence in the record.[75] In the *Declaratory Ruling*, the Commission interpreted Section 253(a) of the Communications Act to bar explicit refusals to authorize deployment ("explicit moratoria") and *de facto* refusals to allow deployment ("*de facto* moratoria"), finding that both forms of moratoria prohibit telecommunications services and have the effect of prohibiting service in direct contravention of the ban enacted by Congress.[76] It found further that moratoria were not likely to fall within the savings clauses in Sections 253(b)

[74] *See* Coalition Petition at 19-20. The Coalition's "double wood" proposal would allow the pole owner to use a contractor to transfer attachers' facilities to a replacement pole in circumstances where the attacher fails to timely transfer its facilities.
[75] 47 U.S.C. § 253(a). Section 253(a) states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *Id*.
[76] *Declaratory Ruling* ¶¶ 140-52.

and (c).[77] Contrary to the arguments of Petitioners,[78] this ruling is consistent with the Commission's statutory mandate under Section 253, with its authority to interpret provisions of the Communications Act, and with the record in this proceeding.

A. The Commission Reasonably Exercised its Authority to Interpret Section 253.

The Commission holds the power to interpret ambiguous terms in the Communications Act, including those in Sections 253 and 332.[79] Courts have long recognized the Commission's authority to exercise its expertise to fill statutory gaps and interpret ambiguous statutory provisions.[80] Nothing in Section 253(b) or (c) undermines the Commission's authority to interpret Section 253(a). These sections merely prescribe specific limits on the reach of any rule the Commission may adopt. Sections 253(b) and (c) offer localities a safe harbor: if they can

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[77] 47 U.S.C. § 253(b), (c). Section 253(b) provides an exception for state requirements that are (1) imposed on a competitively neutral basis, (2) are consistent with Section 254 of the Communications Act, and (3) "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." *Id.*

[78] *See* Michael C. Levine, County Road Association of Michigan Request for Reconsideration, WC Docket No. 17-84 & WT Docket No. 17-79 (Sep. 4, 2018) ("Michigan Road Petition"); City of New York Petition for Reconsideration Regarding Sections III. G. and IV. Of the Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 & WT Docket 17-79 (Sep. 4, 2018) ("New York Petition"); Smart Communities and Special Districts Coalition Petition for Reconsideration, WC Docket No. 17-84 & WT Docket 17-79 (Sep. 4, 2018) ("Smart Communities Petition") (collectively "Petitioners").

[79] *Declaratory Ruling* ¶¶ 161-62 (citations omitted); *National Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (finding that the Commission has authority to interpret ambiguous terms in the Communications Act).

[80] *See City of Arlington, Tex. v. FCC*, 668 F.3d 229, 241-46 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013) (upholding the Commission's authority to interpret Section 332 of the Act in a declaratory ruling); *North County Communications Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1155 (9th Cir. 2010) ("the FCC is the agency that is primarily responsible for the interpretation and implementation of the Telecommunications Act and of its own regulations").

show their actions fall within the purview of these provisions, Section 253(a)'s limitations do not apply.[81] So, where a state or local authority can show that it has put in place competitively neutral "requirements *necessary* to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, [or] safeguard the rights of consumers," it may in those limited circumstances enact policies that effectively prohibit the provision of service.[82] But the Commission correctly concluded that the term "necessary" imposes a high bar. States must show that the requirement at issue is *essential* to one of the goals enumerated in Section 253(b).[83] And Section 253(c)'s reservation of state and local rights to manage rights of way bars rights-of-way management practices that are unreasonable, not competitively neutral, or discriminatory.

The Commission reasonably exercised its authority here to find that certain narrowly defined actions by state and local governments – imposing express or *de facto* moratoria[84] preventing the deployment of telecommunications services – "are facially inconsistent with Section 253(a)," because moratoria "halt[] the acceptance, processing, or approval of applications or permits for such services or facilities used to provide such services."[85] The

[81] *See* 47 U.S.C. § 253(b), (c) (exempting from the limitations of Section 253 certain listed state and local duties and powers).
[82] 47 U.S.C. § 253(b) (emphasis added).
[83] *See Necessary*, Black's Law Dictionary (10th ed. 2014) (defining necessary as "essential"); *Declaratory Ruling* ¶ 158 and *id*. n.584.
[84] The Commission defines express moratoria as "state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities." *Declaratory Ruling* ¶ 145. It defines *de facto* moratoria as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium." *Id*. ¶ 149.
[85] *Declaratory Ruling* ¶¶ 147, 151.

Commission also found that the Section 253(b) and (c) exceptions are not likely to protect moratoria because most moratoria are not competitively neutral, are not necessary to preserve universal service, are unlikely to be necessary to protect the public safety and welfare, and are not likely to implicate legitimate rights-of-way management issues.[86] Although Petitioners raise a number of legal and factual objections to the moratoria ruling, as discussed below, none of their arguments is compelling or requires reconsideration of any aspect of the *Declaratory Ruling.*

B. The Commission Appropriately Applied Section 253 to Moratoria Prohibiting Wireless Infrastructure Deployment.

The Commission properly applied its moratoria ruling to wireless services and facilities, and, notwithstanding the Petitioners' arguments to the contrary, those services and facilities are clearly within the ambit of Section 253(a).[87] New York and Smart Communities repeat flawed arguments made by Smart Communities in the underlying proceeding that Section 332(c)(7)(A)[88] precludes preemption of wireless deployment under Section 253.[89] These arguments misconstrue the different purposes of each provision.

Sections 253 and 332 play different roles with regard to wireless siting matters. Section 332 applies to "decisions regarding the placement, construction, and modification of personal

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[86] *Declaratory Ruling* ¶¶ 153-60.

[87] *Declaratory Ruling* ¶ 142. *See also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-19 & WC Docket No. 17-84; FCC 18-133, ¶ 36 n.83 (Sep. 27, 2018) ("*Local Barriers Ruling*").

[88] 47 U.S.C. § 332(c)(7)(A). The provision states, "Except as provided in this paragraph, nothing in the Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.*

[89] *See* New York Petition at 15-18, Smart Communities Petition at 4.

wireless service facilities"[90] – that is, to individual siting decisions rendered by state or local governments. Section 332 offers an avenue of relief for these individualized decisions. Section 253, on the other hand, targets for preemption "State or local statute[s] or regulation[s], or other State or local legal requirement[s]."[91] As courts have consistently recognized, Section 253 applies to a local government's statute, regulation, or similar generally applicable legal requirement that governs wireless providers' attempt to secure access to rights-of-way – such as ordinances that require large separation distances between facilities, impose right-of-way fees, or adopt restrictive equipment size limits.[92] Nothing in Section 332(c)(7)(A), which applies only to "*decisions* regarding the placement, construction, and modification of personal wireless service facilities,"[93] precludes a cause of action under Section 253 against local regulations or ordinances that prohibit or have the effect of prohibiting the provision of wireless telecommunications service.[94]

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[90] 47 U.S.C. § 332(c)(7)(A).
[91] 47 U.S.C. § 253(a).
[92] *See Verizon Wireless (VAW) LLC v. City of Rio Rancho, New Mexico*, 476 F. Supp. 2d 1325, 1336 (D.N.M. 2007) ("Section[] 253 … proscribe[s] ordinances that have the effect of prohibiting the ability to provide telecommunications services…. Section 332(c)(7) provides similar proscriptions on individual zoning decisions. The statutes thus provide parallel proscriptions for ordinances and individual zoning decisions."); *Cox Commc'ns v. City of San Marcos*, 204 F. Supp. 2d 1272, 1277 (S.D.Cal. 2002) ("Where 47 U.S.C. § 253 provides a cause of action against *local regulations*, section 332 gives a cause of action against *local decisions*.").
[93] 47 U.S.C. § 332(c)(7)(A) (emphasis added).
[94] This distinction also explains why Section 6409 of the Spectrum Act, 47 U.S.C. § 1455, expressly notes that it takes precedence over Section 332(c)(7), but is silent with regard to Section 253. It is not because Section 253 is not meant to apply to wireless technology at all. Instead, Section 6409 applies only to state and local decisions to approve or deny "eligible facilities request for a modification of an existing wireless tower or base station" – that is, to *individual siting decisions*. 47 U.S.C. § 1455. Because Section 332(c)(7) is the provision of the Communications Act that addresses state and local authority with regard to wireless siting decisions – while Section 253 addresses preemption of state and local ordinances and policies – it makes sense that Section 6409 would only address its relationship to Section 332(c)(7).

The plain language of Sections 253 and 332 supports a distinction between preemption of local ordinances and practices versus preemption of individual siting decisions – and allows wireless providers to challenge the former under Section 253. At most, the interplay between these statutes creates an ambiguity that the Commission has authority to resolve. Court decisions construing Section 332(c)(7)(A) to apply only to individual siting decisions[95] likewise undermine the municipalities' argument concerning the role of each of these provisions[96] No argument advanced by the municipal commenters suggests that the statutory language unambiguously requires their interpretation, meaning there is no reason for the Commission to reconsider the application of Section 253 to statutes, regulations, or similar generally applicable requirements or practices that effectively prohibit the provision of wireless service.[97]

C. The Commission Correctly Interpreted and Applied Section 253(a).

Contrary to claims by Petitioners, the Commission properly interpreted and applied Section 253(a) in ruling that moratoria are unlawful. Petitioners argue that the Commission erred by interpreting the "prohibit or have the effect of prohibiting" language in Section 253(a) to preempt state or local requirements that impede or limit providing service, rather than applying a more rigid showing of an "actual or effective prohibition."[98] But here again the Commission reasonably exercised its authority to interpret the statute. It did so by affirming its long-standing decision in *California Payphone* that "state or local action effectively prohibits provision of service when it 'materially inhibits or limits the ability of any competitor or

[95] *See City of Rio Rancho*, 476 F. Supp. 2d at 1336; *City of San Marcos*, 204 F. Supp. 2d at 1277.
[96] *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).
[97] *See* Verizon Reply Comments, WT Docket No. 17-79 & WC Docket No. 17-84, at 10-12 (July 17, 2017) ("Verizon July 17 Reply Comments").
[98] Smart Communities Petition at 5-7; New York Petition at 21.

potential competitor to compete in a fair and balanced legal and regulatory environment.'"[99] The Commission was well within its authority to interpret Section 253 consistent with its prior interpretations.[100]

D. Section 253 Applies to Moratoria Prohibiting Attachments to Government Owned Structures.

The Commission has authority under Section 253 to ban moratoria that prohibit or have the effect of prohibiting attachments to government owned structures. The Commission's ruling applies to frequent and lengthy delays in processing applications to place facilities on municipal utility poles.[101] Smart Communities argues that Section 253 does not reach attachments to municipally owned utility poles because (1) local governments own such poles in a proprietary capacity, and Section 253 reaches only those activities taken in a regulatory capacity; and (2) Section 224 of the Act,[102] which governs utility pole attachments, specifically excludes government owned utilities from its provisions.[103] Each argument is wrong.

The Commission correctly disposed of both arguments in its recent *Local Barriers Ruling*. There it found that nothing in Section 253 suggests that the statute does not apply to actions taken by a state or local entity in a proprietary capacity as a property owner. In any event, it found that state and local entities act in a regulatory capacity when governing access to structures in rights-of-way.[104] Likewise, the Commission reasonably declined to read the

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[99] *Declaratory Ruling* ¶ 147 n.542, *quoting California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd 14,191, ¶ 31 (1997) ("*California Payphone*").
[100] *See Local Barriers Ruling* ¶¶ 34-42 (reaffirming *California Payphone* and rejecting the more rigid standard adopted by some courts and relied on here by Petitioners).
[101] *Declaratory Ruling* ¶ 149 n.554.
[102] 47 U.S.C. § 224. Section 224(a)(1) excludes state entities from the definition of "utility." 47 U.S.C. § 224(a)(1).
[103] Smart Communities Petition at 8-9.
[104] *Local Barriers Ruling* ¶¶ 92-97. *See also* Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (Aug. 2, 2018).

exclusion of state- and cooperative-owned utilities from the definition of utility in Section 224 as an intent by Congress to exclude such poles from the reach of any other provision in the Act. It thus concluded that its "interpretation of effective prohibition extends to fees for all government-owned property in the [right-of-way], including utility poles."[105]

E. The Commission Correctly Held that the Limited Safe Harbor in Section 253(b) Does Not Authorize Moratoria.

The Commission correctly held that Section 253(b)'s safe harbor only applies to certain state laws, and that in any event it does not shield local express or *de facto* moratoria, because those barriers are "blunt instruments" that go far beyond regulation that is "necessary" to achieve the objectives Section 253(b) identifies.[106] Smart Communities ignores Section 253(b)'s explicit limitation to "State" requirements, which alone is fatal to its attempt to defend *local* moratoria under that provision.[107] It also makes the straw man argument that there is no indication Congress intended to suspend localities' "police powers."[108] But the ruling expressly *preserves* localities' police powers to manage rights-of-way, for example through "time, place and manner" requirements, and narrowly prohibits only local laws or practices that go much farther by refusing to process applications at all.[109] In any event, Smart Communities fails to demonstrate how moratoria "advance universal service" or any of the other goals Section 253(b) delineates.[110] On their face, moratoria impede those goals by frustrating providers' efforts to

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[105] *Local Barriers Ruling* ¶ 92 n.253.
[106] *Declaratory Ruling* ¶¶ 154-58.
[107] As the Commission notes, Section 253(b), unlike Sections 253(a), (c), and (d), references only "State" requirements. *Declaratory Ruling* ¶ 154 and *id*. n.569 (citing cases limiting Section 253(b)'s availability to state actions).
[108] Smart Communities Petition at 9.
[109] *Declaratory Ruling* ¶ 156.
[110] 47 U.S.C. § 253(b)(preserving state requirements "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers").

provide the public with new, expanded or improved services. And Smart Cities fails to demonstrate how moratoria meet Section 253(b)'s requirement that they be "necessary" to accomplish those objectives – which of course they are not. While it claims that the Commission reads "necessary" too broadly to mean "essential," the ruling is squarely aligned with previous decisions interpreting Section 253(b).[111]

Nor does the Commission's ruling, as New York claims, prevent localities from managing the use of rights-of-way. New York argues that Section 253(a) cannot be used as a "trump card that defeats" all other uses of rights-of-way, arguing that cities must accommodate many competing uses, such as for signage, energy, and water facilities.[112] The ruling does not preclude localities from exercising their responsibility to manage how rights-of-way are used – in fact it recognizes that function. But moratoria are not right-of-way management policies – they flatly bar any access. They do not reflect balancing and managing different uses – they completely wall off rights-of-way from access by communications facilities, undermining the cardinal goal of Section 253 (and the Act) to promote additional communications services.

Section 253(b) is a safe harbor from Section 253(a); it does not overwrite it altogether. Where no provision of Section 253(b) applies, and a law or practice violates Section 253(a), then the law or practice is unlawful. In this way, Sections 253(a) and (b) work in tandem against laws or practices that have the effect of prohibiting service and do not meet Section 253(b)'s requirements.[113] The Commission correctly ruled that moratoria do not qualify for the Section

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[111] *Declaratory Ruling* ¶ 158 n.584, citing *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19,713, ¶ 22 (1996); *Classic Telephone, Inc.*; *Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13,082, ¶ 38 (1996).
[112] *See* New York Petition at 13.
[113] *See*, *e.g.*, Verizon July 17 Reply Comments at 15-16 (discussing interaction of provisions in Section 253).

253(b) safe harbor, and New York fails to supply any facts or arguments that establish that the ruling misinterprets the statutory scheme.

F. The Section 253(c) Safe Harbor Likewise Does Not Preclude a Ban Against Moratoria.

Petitioners' objections to the Commission's conclusion that Section 253(c) does not remove moratoria from the scope of Section 253(a) are also wrong. Smart Communities argues that the Commission lacks "the authority to dictate which practices are and are not permissible; as long as a practice is within the scope of right-of-way management, it is protected."[114] This is yet another overstated claim that mischaracterizes the *Declaratory Ruling*, because the Commission acknowledges that Section 253(c) authorizes state and local authorities to "manage the public rights-of-way … on a competitively neutral and nondiscriminatory basis." But Section 253(c) does *not* authorize moratoria, because by definition moratoria "bar providers from obtaining approval to access the right-of-way."[115] Put another way, when a moratorium is in force, there is no rights-of-way use to "manage" in the first place, making Section 253(c) inapplicable.

Nor are moratoria "competitively neutral and nondiscriminatory." New York argues that a moratorium against access to rights-of-way meets Section 253(c)'s requirement that a local law or practice be "competitively neutral and nondiscriminatory," as long as the locality provides access to property *outside* the rights-of-way.[116] The Commission correctly rejected that argument, finding that "most moratoria are not competitively neutral – they almost certainly will favor incumbents over new entrants and existing modalities over new technologies."[117] This is

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[114] Smart Communities Petition at 10.
[115] *Declaratory Ruling* ¶ 160.
[116] *See* New York Petition at 14.
[117] *Declaratory Ruling* ¶ 155. While the ruling discusses the term "competitively neutral" in the context of Section 253(b), Section 253(c) contains the same requirement.

readily apparent by considering New York's position: It would have the Commission rule that, after previously allowing providers access to rights-of-way, a locality can lawfully adopt a moratorium barring new entrants and new services from that same access. It is hard to conceive of laws or practices that are *less* competitively neutral, and *more* antithetical to the Act's fundamental purpose to foster new services to benefit the public, than express and *de facto* moratoria.

G. Section 253(d) Does Not Bar the Commission from Interpreting Section 253(a) to Ban Moratoria.

The Commission did not run afoul of Section 253(d) when it interpreted Section 253(a) to ban moratoria. Section 253(d) requires the Commission to preempt any requirement that it finds, after notice and an opportunity for public comment, violates Section 253(a) or (b).[118] Petitioners argue that the Commission can preempt state or local actions through a Section 253(d) proceeding and not through a ruling interpreting Section 253(a).[119] But the Commission appropriately rejects this argument for two reasons. First, it finds that Section 253(d) does not limit the Commission's authority to interpret other provisions of the statute, which is what the Commission did here.[120] It finds support for that conclusion in the many court decisions that have not read Section 253(d) as the exclusive remedy for an alleged Section 253(a) violation.[121] Second, it notes that its action here does not specifically preempt any state or local law or requirement. So even if Section 253(d) were the sole vehicle for preempting a state or local law (and it is not), the Commission's interpretation that Section 253(a) bans moratoria would not violate that requirement.[122]

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[118] 47 U.S.C. § 253(d).
[119] *See* New York Petition at 10-11; Smart Communities Petition at 21-23.
[120] *See Declaratory Ruling* ¶¶ 163-65.
[121] *See id.* ¶¶ 163-65 (citations omitted).
[122] *See id.* ¶ 164.

H. The Commission Properly Rejected Smart Communities' Tenth Amendment Argument.

The Commission's ruling does not violate the Tenth Amendment. Smart Communities incorrectly argues that the *Declaratory Ruling* violates the Tenth Amendment because it "commandeers the local administration of public property in service of a federal regulatory program" by proscribing specific practices.[123] The ruling, however, does not compel specific, affirmative conduct by state or local governments. Absent such a mandate, the "anti-commandeering" mandate of the Tenth Amendment is inapplicable.[124]

Smart Communities' reliance on *Printz v. United States*[125] is misplaced. In that case, the Supreme Court reviewed a statute that compelled state and local governments to implement a background check system for handgun ownership, thereby compelling states to pay for and fulfill a federal obligation. Here, by contrast, the Commission interpreted Section 253(a) to *limit* the action of state and local governments that run afoul of federal law. It did not compel them to take particular action or to fulfill a federal obligation. Nor does prohibiting the imposition of moratoria shift any costs of regulation from the federal government to the states. *Murphy v. National Collegiate Athletic Association*,[126] which Smart Communities also cites, is likewise inapplicable. There the Supreme Court addressed a federal statute that effectively precluded New Jersey from repealing its sports gambling law. Here, the Commission is not precluding a

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[123] Smart Communities Petition at 23.
[124] *See, e.g.*, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000); *Cable Franchising Report and Order*, 22 FCC Rcd 5110, ¶ 136 (2007) (rejecting argument that the Commission's regulation of cable franchising violates the Tenth Amendment's anti-commandeering doctrine).
[125] 521 U.S. 898 (1997).
[126] *See* 584 U.S. __ (2018), https://www.supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf

state (or locality) from repealing any law. To the contrary, it is interpreting Section 253(a) of the Act to prohibit the enactment of moratoria.

The limits the Commission adopted are just as lawful as other limits it has imposed on local regulation, such as over the licensing and operation of radio stations and the review of siting applications.[127] As the Commission more recently held in addressing a Tenth Amendment argument against its interpretations of Sections 253 and 332(c)(7), the "outcome of violations of Section 253(a) or Section 332(c)(7)(B) of the Act are no more than a consequence of 'the limits Congress already imposed on State and local governments' through its enactment of Section 332(c)(7)."[128] In short, the Tenth Amendment presents no bar to the Commission's proper determination that moratoria violate both the language and the purpose of Section 253.

[127] Courts have upheld such actions against a Tenth Amendment challenge. *See*, *e.g.*, *Montgomery County v. FCC,* 811 F.3d 121, 133 (5th Cir. 2015) (concluding that the FCC's "deemed granted" remedy when localities fail to act on wireless siting permit applications did not violate the Tenth Amendment because it did not require specific state action.).
[128] *Local Barriers Ruling* ¶ 101.

III. CONCLUSION

As discussed above, the Commission should deny the petitions for reconsideration of the Third Report and Order and Declaratory Ruling.

Respectfully submitted,

VERIZON

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Dated: November 9, 2018

Certificate of Service

I hereby certify that on this ninth day of November, 2018, I caused a copy of Verizon's Opposition to the Petitions for Reconsideration of the Third Report and Order and Declaratory Ruling to be sent by U.S. mail to the following:

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